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Nos. 80-1798, 80-1806, and 81-91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WOELKE & ROMERO FRAMING, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondents.

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BRIEF FOR RESPONDENT UNIONS

This brief is submitted jointly by all the respondent unions in these consolidated cases and by American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the federation of national and international unions with which those unions are affiliated. The decision to file a single brief reflects the identity of their views on the issue presented, and their desire to minimize the burdens on the Court by stating their common position only once.

STATUTE INVOLVED

This case involves §§ 8(b)(4) & 8(e) of the National Labor Relations Act, 49 Stat. 449, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 141 *et seq.* These provisions are reproduced in pertinent part in the appendix hereto.

STATEMENT OF THE CASE

We accept the statement of the case in the brief of the National Labor Relations Board (hereafter "the Board").

SUMMARY OF ARGUMENT

I

The principal issue in this case is the meaning of the construction industry proviso to § 8(e) of the National Labor Relations Act, which was added to the Act in 1959. Petitioners and the *amici* on their side contend that this proviso protects only agreements negotiated on a job-site-by-job-site basis. This is wholly inconsistent with the language and legislative history of the Act, which make clear that all agreements relating to subcontracting of work on a construction site entered into within the context of a collective bargaining relationship are protected by the proviso. Moreover, petitioners' reliance on *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, is misplaced because that decision involved, and its holding is limited to, agreements between a union and a contractor entered into *outside* a collective bargaining relationship.

A. We begin, of course, with the language of the proviso, which provides that "nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction * * * of a building, structure or other work." The agreements challenged in this case unmistakably fit within this language.

B. We show next from the legislative history of the proviso that Congress intended to preserve the legality of agreements such as those here. The construction industry proviso, and a somewhat broader proviso concerning the apparel and garment industry, originated in the Conference Committee which was charged with compromising a disagreement between the House and the Senate concerning the scope of the prohibition of "hot cargo" clauses. The Senate bill had outlawed such agreements only in the trucking industry, and the House bill had outlawed them generally. The Senate Conferees insisted that such agreements relating to work on a construction site be excluded from this prohibition. Accordingly, the explanations of the proviso in the Conference Report, and by Senator Kennedy, the Chairman of the Senate Conferees, explaining the Conference Bill to the Senate, are authoritative and controlling explanations of the proviso. Both the Conference Report and Senator Kennedy's statement state expressly that the purpose of the proviso is to preserve the legality of agreements relating to job site work in the construction industry. 1 Leg. Hist. 943; 2 Leg. Hist. 1433. In Senator Kennedy's words:

> Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them. [2 Leg. Hist. 1433.]

Senator Kennedy also said that the Senate's insistence upon the qualification of § 8(e)'s prohibition "for agreements relating to work to be done at the site of a construction project" was "necessary to avoid serious damage to the pattern of collective bargaining in th[is] industr[y]." 2 Leg. Hist. at 1432.

The law in 1959 was, and Congress recognized it to be, that agreements like those at issue in this case were

lawful. See *Carpenters' Union v. Labor Board*, 357 U.S. 93 (*Sand Door*) (which gave rise to the move to outlaw "hot cargo" clauses by holding that hot cargo agreements were lawful under the pre-1959 act) and *Northern California Chapter, the Associated General Contractors of America, Inc. (St. Maurice, Helmkamp & Musser)*, 119 NLRB 1026 (1957), review denied and enforced *sub nom. Operating Engineers Local 3 v. NLRB*, 266 F.2d 905 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 864 (regarding which extensive testimony had been given at the House Committee hearings which was studying labor legislation, including legislation on the problems in the construction industry). We also show, on the basis of a 1961 study that agreements like the present were well-known in the construction industry as of 1959.

Petitioners and the *amici* on their side have not been able to point to anything in the legislative history which contradicts the Conference Report or Senator Kennedy's statement. Nor have they shown that such agreements were illegal, or that they were not prevalent in the industry.

Rather, petitioners argue that the exclusive purpose of the proviso was to eliminate the "*Denver Building*" problem and that the *Denver* problem is confined to the friction between union and non-union workers on a construction job site. We show that petitioners are wrong in both respects. As to the latter point, the central problem created by *Labor Board v. Denver Bldg. Council*, 341 U.S. 675, is that the decision treats each of the contractors on a construction site as a separate person for purposes of the secondary boycott provision of the Act (§ 8(b)(4)). One result of this holding, as the dissent in that case points out, is that union and non-union workers might be required to work on the same job. But that is by no means the only consequence of the decision which the construction unions have considered to be seriously adverse to their interests: the basic problem, as they saw it from the first, is that construction unions

cannot picket a general contractor (or a subcontractor) to preserve their wages and working conditions.

In studying the *Denver Building* problem, the Conferees agreed that the unity of all the contractors on a construction project should be recognized in applying the secondary boycott provision, and it was therefore proposed that the Conference Bill would amend the Act to overrule *Denver Building*. A parliamentary problem prevented that course of action. However, the Conferees did act on their view of *Denver Building's* basic error by refusing to extend its holding by a § 8(e) prohibition of all secondary agreements between unions and contractors regulating the labor conditions of subcontractors. The Conferees, at the Senate's insistence, added the construction industry proviso to preserve the legality of such agreements.

The history of the legislation prior to the Conference indicates also that Congress' preception of job and employment practices in the construction industry was considerably informed by its study of hiring arrangements which led to the enactment of § 8(f). We show that subcontracting restrictions of the type involved here are necessary to protect the work standards of union employees in the industry, because, as Congress well knew, such employees are not attached to a particular employer, but to the industry generally. Moreover, unions could not protect their work standards by absolute prohibitions on subcontracting without destroying the pattern of business relations in the industry.

In sum, while we believe it is inappropriate to look behind the unqualified and authoritative explanations of the proviso in the Conference Report and by Senator Kennedy, even if that exercise is undertaken, it supports, rather than undermines, the lesson from those sources.

C. We show next that the *Connell* case does not call for a different result. That decision turned in substance on the fact that the union there sought a subcontracting restriction outside a collective bargaining relationship

between the union and the general contractor, a fact referred to repeatedly in the Court's opinion. This was a novel organizing device not part of the pattern of bargaining that the 1959 Congress intended to preserve. Moreover, that tactic did not further, as the Union in *Connell* conceded, any of the objectives of the proviso; the subcontracting restriction sought was solely a "topdown organizing" device. For that reason, the *Connell* Court thought that Congress could not have intended to permit what the union there was attempting to accomplish. *Connell* does not, however, justify striking down the agreements in this case. The agreements here are demonstrably necessary to achieve other purposes concerning the preservation of the wages and working conditions of already organized employees that Congress did intend to protect through the § 8(e) proviso. Thus, petitioners' repeated insistence that the agreements be struck down as a "topdown organizing device" is contrary to Justice Harlan's teaching in *Machinists* v. *Labor Board*, 362 U.S. 411, 428: "The policy of the Act is embodied in the totality of [Congress'] adjustment, and not necessarily in any single demand which may have figured, however weightily, in it."

II

It is contended in some of the petitioners' briefs that it is unlawful to strike for an agreement whose legality is preserved by the construction industry proviso. That issue is not properly presented because it was not part of the General Counsel's theory before the Board and because petitioners themselves did not raise it there. See §§ 3(d), 10(b) and 10(e) of the Act. And even if the claim is considered, it is without merit. It is contrary to the language of the Act and to its legislative history. Congress did not wish to change the law on this subject as it stood in 1959, and strikes to obtain "hot cargo" clauses were not prohibited by § 8(b)(4) prior to the amendment of § 8(b)(4)(A) in 1959—an amendment deemed necessary precisely to add that prohibition.

ARGUMENT

I. THE BOARD AND THE COURT BELOW CORRECTLY HELD THAT THE CONSTRUCTION INDUSTRY PROVISO TO § 8(e) OF THE NLRA PRESERVES THE LEGALITY OF ALL CONSTRUCTION INDUSTRY SUBCONTRACTING CLAUSES ENTERED INTO WITHIN THE CONTEXT OF A COLLECTIVE BARGAINING RELATIONSHIP.

A. The Agreements in This Case Are Unambiguously Within the Language of the Construction Industry Proviso.

The judicial task in this case is to interpret the construction industry proviso to § 8(e) of the National Labor Relations Act as amended. Accordingly the proper method of analysis is that stated in *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108:

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must cordially be regarded as conclusive.

In 1959, Congress added § 8(e) to the Act. That section declares it to

> be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void:

If that language stood alone, the agreements in the instant case governing the subcontracting of on-site construction work would be prohibited by § 8(e). However, the construction industry proviso unambiguously declares that

> nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

The agreements in this case plainly fit within every word of the foregoing language; accordingly, if these words are to be given effect, "nothing in [§ 8] (e) shall apply" to these agreements.

Petitioners[1] do not contend that the proviso's words can be read diffeerntly nor do they point to legislative

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[1] By "petitioners" we will, unless otherwise indicated, refer also to their supporting *amici*. We note, however, that the brief of *amicus* Chamber of Commerce argues only that an agreement such as those involved in the present case is unlawful if not voluntarily entered into, a point which is separately discussed in Part II of our argument.

This brief does not discuss two issues which are argued in some of the briefs on petitioners' side: (1) whether an agreement which limits subcontracting to contractors who have agreements with particular unions is within the construction industry proviso; (2) whether *Woodwork Manufacturers v. NLRB*, 386 U.S. 612, should be overruled. We do not respond to those arguments because neither issue is properly before the Court. The latter, while raised in one of the petitions, is entirely remote from the issues in this case. *National Woodwork* decided that certain forms of subcontracting restrictions are not covered by §§ 8(b)(4) and 8(e) because they are primary, rather than secondary. In the present case it has been determined below, and it is not in dispute here, that the agreements in question are secondary and would therefore be within § 8(e) but for the construction industry proviso. Accordingly, this Court's ruling in *National Woodwork* in no way affected the decisions below. The "particular union" issue, was not raised in any of the petitions. Moreover, in light of Congress' purpose to preserve the pattern of bargaining in the construction industry, the challenge to particular union clauses which were common in 1959 was rejected unanimously both by the original panel below (609 F.2d at 1350, n.8) and by the District of Columbia Circuit in *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 884-886 (hereafter "*Schriver*").

history which even suggests, let alone clearly expresses, a Congressional intent that notwithstanding the foregoing clear language of the proviso the prohibitions of § 8(e) should be applicable to the agreements here. Indeed, as we show in Point I B of our argument, the legislative history makes clear that Congress in enacting § 8(e) and its proviso did intend to preserve the legality of such agreements.

Rather, petitioners' contrary argument is that these agreements should be deemed illegal, and the proviso should be denied its natural meaning, in light of the decision in *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (hereafter *"Connell"*). As we develop in Point I C hereof, the critical difference between this case and *Connell* is that the agreement which was there held to be illegal despite the proviso was not the normal subcontracting agreement entered into as part of a collective bargaining relationship familiar in 1959, but rather a novel organizing device outside any such bargaining relationship. Under those circumstances, the *Connell* Court held that the agreement served no purpose of Congress in enacting the proviso, and defeated other objectives of the Act. Accordingly, that case was one of those relatively rare occasions on which "a thing may be within the letter of the statute [but] yet not within the intention of its makers." *Connell*, 421 U.S. at 628; *Holy Trinity Church v. United States*, 143 U.S. 457, 459; *Woodwork Manufacturers*, 386 U.S. at 619. But this case is one in which the letter of the statutory language, its spirit and the intent of Congress all call for the same result. Petitioners' attempt to extend *Connell* beyond its unique context, and thereby largely eviscerate the proviso, was properly rejected by the Board, by the court below and by the District of Columbia Circuit in *Shriver* and should be rejected by this Court.

B. The Legislative History Confirms Congress' Intent To Preserve the Legality of The Agreements In This Case.

1. *The Conference Report and Senator Kennedy's Statement Are Authoritative and Controlling.*

The legislative history demonstrates beyond doubt that the sponsors of the construction industry proviso intended to protect *all* clauses in agreements whereby the parties to a collective bargaining relationship have limited the subcontracting of on-site work to "union" subcontractors. The report of the Committee on Conference stated:

> It should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction. The proviso does not exempt from section 8(e) agreements relating to supplies or other products or materials shipped or otherwise transported to and delivered on the site of the construction. The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would be illegal under the *Sand Door* case (*Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958)). *To the extent that such agreements are legal today under section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by section 8(e).*[2]

Senator Kennedy, the Chairman of the Senate conferees, in describing the Conference Agreement to his colleagues likewise explained:

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[2] H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959), 1 National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 943 (GPO 1959) (hereafter, "Leg. Hist.") (emphasis added).

The first proviso under new section 8(e) of the National Labor Relations Act *is intended to preserve the present state of the law* with respect to picketing at the site of a construction project and *with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.*

This proviso affects only section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* (341 U.S. 675) and the *Moore Drydock* (92 N.L.R.B. 547) cases would remain in force.

Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them. Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the *Sand Door* case (357 U.S. 93) is applicable.

It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract. [2 Leg. Hist. 1433, emphasis added.]

Senator Kennedy also said:

Hot cargo: The Landrum-Griffin bill extended the "hot cargo" provisions of the Senate bill, which we applied only to Teamsters, to all agreements between an employer and a labor union by which the employer agrees not to do business with another concern. The Senate insisted upon a qualification for the clothing and apparel industries and for agreements relating to work to be done at the site of a construction project. Both changes were necessary

> to avoid serious damage to the pattern of collective bargaining in these industries. [2 Leg. Hist. 1432]

In his dissenting opinion below, Judge Sneed acknowledged that "Senator Kennedy thought that the construction industry proviso would permit subcontracting clauses such as those challenged in these cases." 654 F.2d at 1326.[3] And particularly because the proviso was added to § 8(e) at the Senate conferees' insistence, and Senator Kennedy was the Chairman of the Senate conferees, the majority below, like the District of Columbia Circuit, properly gave great weight to his uncontradicted explanation of the construction industry proviso. See 654 F.2d at 1312-1313; see also 635 F.2d at 878, 879.

Thus, both the language and the authoritative explanations of the proviso (the Conference Report and Senator Kennedy's statement to the Senate) make clear that the proviso is intended to preserve the legality of on-site subcontracting agreements which were lawful in 1959. Accordingly, it is necessary to examine the state of the law on this subject as of 1959, or more precisely (although with respect to the present issue there is no difference) Congress' perception of the state of that law. See *Brown v. GSA*, 425 U.S. 820, 828; *Schriver*, *supra*, 635 F.2d at 882-883, n.30. Clearly the law was, and Congress believed it to be, that agreements which restrict subcontracting in a collective bargaining relationship between a union and a general contractor were lawful.

In *Carpenters' Union v. Labor Board* (*Sand Door*), 357 U.S. 93 (1958) Justice Frankfurter had unequivocally declared:

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[3] The other statements in the legislative history cited by Judge Sneed do not contradict what Senator Kennedy said; those statements merely give examples of conduct which would be legal under the construction industry proviso without any indication that those examples were intended to be exhaustive.

> *Certainly the voluntary observance of a hot cargo provision by an employer, does not constitute a violation of § 8(b)(4)(A), and its mere execution is not,* contrary to the suggestion of two members of the Board in the *Genuine Parts* case, *Truck Drivers Union,* 119 N.L.R.B. 399, *prima facie evidence of prohibited inducement of employees.* It does not necessarily follow from the fact that the unions cannot invoke the contractual provision in the manner in which they sought to do so in the present cases that it may not, in some totally different context not now before the Court, still have legal radiations affecting the relations between the parties. All we need now say is that the contract cannot be enforced by the means specifically prohibited in § 8 (b) (4) (A). [357 U.S. 108.][4]

Section 8(e) was a direct response to the *Sand Door* decision. In the words of the *Connell* opinion, § 8(e) "was part of a legislative program designed to plug technical loopholes in § 8(b) (4)'s general prohibition of secondary activties." 421 U.S. at 628.[5] The bill which passed the Senate outlawed "hot cargo" agreements only in the trucking industry, but the Landrum-Griffin substitute which passed the House outlawed such agree-

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[4] Thus, the original panel of the Ninth Circuit erred when it said in the present case that "the lawfulness of union signatory clauses such as those challenged here was not determined in *Sand Door.*" 609 F.2d at 1349.

[5] As this Court explained in *National Woodwork*:

> Section 8(e) simply closed still another loophole. In *Local 1976, United Brotherhood of Carpenters v. Labor Board* (*Sand Door*), 357 U.S. 93, the Court held that it was no defense to an unfair labor practice charge under § 8(b) (4) (A) that the struck employer had agreed, in a contract with the union, not to handle nonunion material. However, the Court emphasized that the mere execution of such a contract provision (known as a "hot cargo" clause because of its prevalence in Teamsters Union contracts), or its voluntary observance by the employer, was not unlawful under § 8(b) (4) (A). Section 8(e) was designed to plug this gap in the legislation by making the "hot

ments in all industries. *Id.* at 635-637. The Conference Committee adopted the Landrum-Griffin version except that at the Senate's insistence it added two provisos, "to preserve the *status quo* in the construction industry, and exempt the garment industry from the prohibitions of §§ 8(e) and 8(b)(4)(B)." *Id.* at 637-638. And as Senator Kennedy said:

> Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). [2 Leg. Hist. 1433.]

Further evidence of the 1959 law, and Congress' view thereof is provided by the fact that the Board and the District of Columbia Circuit had specifically, prior to the amendment of the Act in 1959, sustained a subcontracting clause like those here in *Northern California Chapter, the Associated General Contractors of America, Inc., (St. Maurice, Helmkamp & Musser)*, 119 NLRB 1026 (1957), review denied and enforced *sub nom. Operating Engineers Local 3 v. NLRB*, 266 F.2d 905 (D.C. Cir., 1959), *cert. denied*, 361 U.S. 864 (hereafter *"Musser"*). That case was expressly called to Congress' attention at the hearings of the House Labor Committee by union and employer witnesses who had been involved in that litigation.[8] Petitioner Woelke is mistaken in its reliance, at p. 22 of its brief, on the minority opinion of members Rodgers and Jenkins in *Musser*, because those views were

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cargo" clause itself unlawful. The *Sand Door* decision was believed by Congress not only to create the possibility of damage actions against employers for breaches of "hot cargo" clauses, but also to create a situation in which such clauses might be employed to exert subtle pressures upon employers to engage in "voluntary" boycotts. [386 U.S. at 634, footnote omitted.]

[8] See *Labor-Management Reform Legislation: Hearings on H.R. 3540, H.R. 3302, H.R. 4473, and H.R. 4474*, Before a Joint Committee of the House Committee on Education and Labor, 86th Cong., 1st Sess. (1959) (hereafter "House Hearings") 801, 803-807, 2365-2367.

disapproved by the Board majority, and on review by the Court of Appeals. Thus, what the Court said in *Shriver* is equally true here:

> The employers in this action have not cited a single case in which a subcontracting agreement was found to be unlawful prior to 1959 by reason of the fact that the agreement was not limited to particular jobsites at which signatory union workers were employed. [635 F.2d at 879.]

In sum, the legislative history of the construction industry proviso makes clear that Congress intended to assure that agreements which, like those here, were lawful before 1959, did not become unlawful by virtue of the new § 8(e), and thereby confirms what the language of that proviso unambiguously says. Under these circumstances, there is simply no justification for searching out a narrower purpose, and if one is found, confining the scope of the enactment on that basis, rather than according the proviso the full effect as declared by its sponsors and never denied by any other legislator. To do so would be to render unlawful by virtue of § 8(e) agreements which were lawful before that section was enacted, contrary to what the Conference Report and Senator Kennedy said would be the effect of the proviso, and contrary to its language. Nevertheless, petitioners' basic position is that the proviso is to be construed to encompass only agreements which accomplish what petitioners declare to be its specific purpose: They portray the purpose of the proviso as being limited to the "*Denver Building*" problem, and then in turn, reduce that problem to jobsite friction between union and nonunion workers. In the next two sections of our argument we show that petitioners misstate both the proviso's purpose and the 1959 Congress' understanding of the nature and extent of the "*Denver Building*" problem. Thus, the path which petitioners invite the Court to take is not only an impermissible approach to statutory construction, it is one which when followed, does not lead to the conclusion they assert.

2. *The True Nature of the* Denver Building *Problem.*

The "*Denver Building* problem" refers, of course, to this Court's decision in *Labor Board v. Denver Bldg. Council*, 341 U.S. 675. Petitioners would have it that the "*Denver Building*" problem is confined to friction between union and nonunion workers on a construction jobsite, a point addressed by Justice Douglas' dissent in the *Denver Building* case, and by some post-1959 Court of Appeals opinions.[7] But such friction is only *one* consequence of the Court's holding in *Denver Building* that the general contractor and each subcontractor are to be deemed separate persons for the purposes of the secondary boycott provisions of the Act with the result, as in *Denver Building* itself, that a strike against the general contractor to compel him to cease doing business with subcontractor is a violation of § 8(b)(4). See 341 U.S. at 689-690. Thus, this Court said in *Connell*:

> Discussion of "special problems" in the construction industry, applicable to both the § 8(e) proviso and the attempt to overrule *Denver Building Trades*, focused on the problems of picketing a single nonunion subcontractor or a multiemployer building project, *and the close relationship between contractors and subcontractors at the jobsite.* [421 U.S. at 629-630, emphasis added. See also *id.* at 630, n.9 citing portions of the legislative history.]

The 1959 legislative history makes clear Congress' awareness of and concern with the fact that given the structure of the construction industry *Denver Building's* failure to recognize the close relationship between a general contractor and his subcontractors worked to deny construction unions a right enjoyed by industrial unions— the

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[7] 341 U.S. at 692-693. See also *Drivers Local 695 v. NLRB*, 361 F.2d 547, 553 (D.C. Cir.); *Essex County & Vicinity District Council of Carpenters v. NLRB*, 322 F.2d 636, 640 (3 Cir.).

right to protect their working conditions by picketing a job site at which there is a labor dispute.[8]

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[8] So, for example, the memorandum by Representatives Thompson and Udall explained:

> First, the amendment is necessary to extend to unions in the construction industry the rule which presently applies to employees in all other industries. *Employees of a mine or mill-owner or in a factory may peacefully picket their place of employment in seeking higher wages, shorter hours, better conditions of employment, or other lawful objectives.* So long as their placards are honest, the pickets do not have to choose their words with an eye to the legal consequences. They may ask other employees not to cross the picket line.
>
> *Construction workers are denied this basic freedom to picket the scene of a labor dispute, as explained above, because of the peculiar structure of the construction industry.* If the union which represents the electricians in the electrical maintenance department of a factory engages in picketing and the employees in other departments honor the picket line, there is no secondary boycott. It should make no difference that the departments of a construction job are different contractors for they are working toward one common goal.
>
> Second, none of the grounds for outlawing secondary boycotts apply to picketing of a construction site where the employer engaged in the primary labor dispute is actually working.
>
> (a) When the picketing is confined to the construction site where the primary employer is working, there is no danger of the dispute spreading through the community in the manner of true secondary boycotts.
>
> (b) Where all the men are employed on the same project, the division into different trades or crafts, each with its own employer, must not be allowed to obscure their common interests—they work side by side and the wages and working conditions of one trade affect all the others. This situation is utterly unlike the situation in true secondary boycotts, as where carpenters in Los Angeles refuse to work on nonunion doors made in Minnesota by men whose wages could not affect the wages of carpenters in Los Angeels. The illegality of such a boycott would not be affected by the amendment.
>
> (c) The third reason for outlawing secondary boycotts is that they drag neutral employers into disputes in which they

But for a parliamentary problem (2 Leg. Hist. 1397-1398, 1434-1436), the Conferees would therefore have reversed *Denver Building* by treating the contractors and the subcontractors on a construction site as a single employer for purposes of the secondary boycott provisions of the Act. This change would have *narrowed* the application of both §§ 8(b)(4) & 8(e) in the construction industry. In contrast, adoption of § 8(e) as passed by the House, whose language in essence tracked that of § 8(b)(4), would have *extended* the *Denver Building* principle from picketing to agreements, and would have prohibited all secondary agreements between unions and contractors regulating the labor conditions of subcontractors. Because the Conferees recognized the essential unity of all contractors on a construction site, and because of the procedural roadblock to full effectuation of thta recognition, the Conferees determined to exclude such agreements from § 8(e) and by doing so to at least prevent the extention of the *Denver Building* principle.

3. *Other Problems of the Construction Industry Of Which Congress Was Aware When it Sought To Preserve the Pattern of Bargaining in That Industry.*

(a) The 1959 Congress' perception of business and employment practices and collective bargaining agreements in the construction industry was considerably informed by its study of hiring arrangements in that industry which led to the enactment of § 8(f). This matter was the subject of hearings in the labor committees of both Houses; it was against this background that the Conferees considered the construction industry's special

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have no interest. Where all the employers affected are bound together in the common work of putting up a single building, none is truly neutral. The undertaking is so integral that each is affected by and can influence the conduct of the others. [2 Leg. Hist. 1577, emphasis added.]

problems when the differing versions of § 8(e) came before them.

Congress recognized that construction industry employees work for many different employers for short periods of time:

> The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending on the various states of construction. [S. Rep. No. 187, 86th Cong., 1st Sess., at 27, 1 Leg. Hist. 424; H. Rep. No. 741 on H.R. 8342 at 19, 1 Leg. Hist. 777.]

Congress also recognized that, in the construction industry

> it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, *such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated.* [S. Rep. No. 187, 86th Cong., 1st Sess. 27 (1959), 1 Leg. Hist. 423 (emphasis added).]

This pattern of bargaining accommodates the specific needs of the contractors in that industry:

> One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool . . . there is no doubt . . . that the union will in fact

represent a majority of the employees eventually hired. [S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959), 1 Leg. Hist. 424.]

In order to reconcile the provisions of the NLRA with the characteristics of the industry and the needs of those working in it, Congress in § 8(f) both permitted voluntary pre-hire agreements, and specifically sanctioned the union's role in referring applicants for employment, permitting "priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area." (§ 8(f)(4).) [9]

(b) The lessons of this legislative history are plain.[10]

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[9] Section 8(f) provides in pertinent part:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or * * * (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

[10] The analysis which follows, while derived from the problems which led to authorizing, *inter alia*, pre-hire agreements in the construction industry, is not to be taken as limited in its application to § 8(f) agreements. Construction industry collective bargaining relationships, even when entered into as a result of a § 9(a)

First, Congress recognized that a construction industry union, in entering into a collective bargaining agreement, is legitimately interested in protecting the interests both of present employees, if there are any, and of future employees of the contractors. Moreover, the union's interest, and that of the employers as well, encompass matters beyond the economic terms and conditions of a particular project, including, principally, the allocation of job opportunities on future projects.[11]

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election or other showing of majority support, are ordinarily characterized by the same degree of intermittent employment, and by agreements which extend beyond the life of the particular project or projects in existence at the time the union proved a majority. Thus, eevn such agreements are in a sense "pre-hire" with respect to projects begun during the terms of the collective bargaining agreement.

[11] In addition to the obvious purpose of assuring the union employees will have jobs in the future at all, there is an additional interest arising from the form of fringe benefits provided in the construction industry. Typically, benefits are provided through contributions to a trust fund jointly administered by the union and employer parties to a collective bargaining agreement, pursuant to § 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5). Section 302 forbids payments into such funds except if "specified in a written agreement with the employer" and also provides that any funds contributed must be "for the sole and exclusive benefit of the employees of such employer . . .". See, *e.g.*, *NLRB v. Amax Coal Co.*, —— U.S. ——, 49 L.W. 4880, 4882 (June 29, 1981). Thus, potential employees of an employer who has promised to provide fringe benefits in this manner have an interest in protecting the integrity of the economic aspects of the collective bargaining agreement which goes beyond a promise not to engage a subcontractor who pays less in total wages and benefits than the monetary equivalent provided in the collective bargaining agreement of the primary contractor. For, a subcontractor who is not a signatory to a written agreement is forbidden by § 302 from paying into the trust fund, and therefore, the fund from which the employees covered by the agreement will later draw their benefits will have less money available than if the subcontractor was also obliged to pay into the fund. Further, the alternative used in *Walsh v. Schlecht*, 429 U.S. 401—permitting subcontracting to a nonsignatory subcontractor but requiring the primary con-

Second, as Congress recognized from its consideration of the *Denver Building* problem, see pp. 16-18, *supra*, subcontracting is the usual rather than the extraordinary practice in the construction industry. Thus, the employees who are ultimately hired will receive the protection provided by the collective bargaining agreement only if subcontracting is limited to subcontractors who are signatories to the same agreement, or one providing identical terms. For example, only through such an agreement can a subcontractor be bound: to hire from the pool of persons the primary contractor has been hiring from;[12] to make fringe benefit contributions on behalf of his employees to a § 302 fund; and to abide by a grievance and arbitration procedure, such as that contained in the agreements here. If the contractor subcontracts work to a *nonunion* subcontractor, work which the contractor could otherwise perform himself with union employees, then the union employees whom the agreement was supposed to protect lose that protection.

The latter point, which is of special practical importance in the construction industry, is further illuminated by comparing the on-site subcontracting problems in that industry to the somewhat different problems presented by

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tractor then to make contributions measured by the hours worked by the subcontractor's employees—solves the problem only in part. The flow of contributions into the fund is maintained, but the union employees who would otherwise have worked on the project are not themselves credited with hours worked for purposes of later benefit calculation; and the employees of the *subcontractor*, even if they turn out to be the same individuals, are "ineligible for trust fund benefits based on . . . work performed for [a nonsignatory subcontractor]." *Walsh*, 429 U.S. at 407.

[12] Indeed, if the referral arrangements with the contractor and the subcontractor are the same, it is likely that the subcontractor will hire the same individuals the contractor would have hired.

subcontracting in the industrial context. In *Fibreboard Corp. v. Labor Board*, 379 U.S. 203, this Court discussed the problem of "contracting out" in the industrial context, and concluded that an employer is obliged to bargain concerning "contracting out of plant maintenance work, previously performed by employees in the bargaining unit, which the employees were capable of continuing to perform * * *." *Id.* at 210. While noting that restrictions in collective bargaining agreements on subcontracting were widespread, the Court did not require bargaining upon all forms of contracting out. *Id.* at 215. Where the company actually "replaced existing employees with those of an independent subcontractor to do the same work under similar working conditions" (*id.* at 213; *see also id.* at 224; Stewart, J., concurring), however, the employees' interest in job security was deemed to be a "term or condition of employment" giving rise to a duty to bargain.[13]

While *Fibreboard* arose in the industrial context, its recognition that employees working under a collective bargaining agreement have a vital interest in seeing that they are not, through the subcontracting device, "replaced * * * with other workers willing to work on the same job in the same [location] without the various fringe benefits so costly to the company" (*id.* at 224 (Stewart, J., concurring)) applies to those who work on construction sites as well. But, because of the difference between industrial and construction site employment, of which the 1959 Congress was well aware, the job security concerns of employees in the construction industry have a somewhat different focus. Because they will in any event be terminated once a given project is completed, the concern of union employees is not that they will be re-

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[13] *First National Maintenance Corp. v. N.L.R.B.*, —— U.S. ——, 49 L.W. 4769, 4772-3 (June 22, 1981), reaffirmed this aspect of *Fibreboard*.

placed by non-union workers at the particular location at which those union employees are already working, but that the union-represented pool of workers as a whole will be "replaced" at future projects. Further, because subcontracting is the usual practice in the industry, for reasons unrelated to labor relations, and because the construction labor pool is not attached to a particular employer but to the industry generally, union construction employees, unlike industrial employees, have no interest in forbidding "contracting out" altogether. Their interest is in assuring that their collective bargaining agreement is respected on each jobsite upon which their employer works, whether he does the work himself or contracts it out.

National Woodwork is also illuminating in this context. The Court there concluded that a particular type of subcontracting clause—that preserving for employees in a unit "work traditionally done by them" (386 U.S. at 635)—is not prohibited by § 8(e) itself even without regard to the proviso. While such clauses come within the terms of § 8(e), their fundamental purpose is primary rather than secondary, and they are therefore not wthin the intended reach of that section. *Id.*

Read in light of both the understanding of the nature of employment in the industry, and the problems generated by *Denver Building*, which Congress did not wish to exacerbate, subcontracting clauses in collective bargaining agreements covering construction site work can be seen to serve basically the same primary purpose as the work preservation clause in *National Woodwork*. A construction industry collective bargaining agreement, like the ones here in question, usually provides that certain kinds of jobs are to be done by the unit employees. An agreement forbidding the contracting out of all such work would plainly be valid under *National Woodwork*. But such an agreement, in the context of the construction industry, would hamper the ordinary practices of em-

ployers with respect to subcontracting, while going further than necessary to preserve the legitimate interests in job security and the integrity of the collective bargaining agreement. The employees' interest is in working, and in working for an employer with whom the union can bargain for continuity in hiring practices, fringe benefit contributions, and other matters not limited to the economic terms of the agreement; whether it is the same or a different employer is immaterial. A union signatory subcontracting clause protects that interest.

(c) The Court of Appeals in *Schriver* recognized "the pattern of collective bargaining in the construction industry in 1959 included subcontracting agreements such as those present in this case" (635 F.2d at 879). That court quoted a report, Lunden, *Subcontracting Clauses in Major Contracts*, 84 Monthly Labor Review 579 (part 1), 715 (part II) (1961) as follows:

> After describing the prevalence of subcontracting agreements in the construction industry, the study noted:
>
> > The single most frequent requirement, found in more than 50 major contracts, called for the subcontractor to comply with all the terms and conditions of the prime employer's agreement. This provision "blankets in" the subcontractor, no matter what project he works on in the local union's jurisdiction or which prime employer he works for.
>
> *Id.* at 715. Although the report surveys and describes every type of subcontracting agreement used in a major collective bargaining agreement in the construction industry at that time, *not one agreement was found to limit the applicability of the subcontracting restriction to particular jobsites at which both union and nonunion workers were employed.* *Id.* at 715-16. [635 F.2d at 859, emphasis in the opinion.]

That court also quoted the Lunden study in describing the purpose of such subcontracting agreements.

> In the construction industry, subcontracting is generally accepted by unions and employers as a normal condition of work. Few provisions were found that attempted to preserve job opportunities by creating certain conditions under which management could contract out. For example, only one clause prohibited subcontracting if it would result in layoff, and a very small number required the company to notify the union in advance of subcontracting or to subcontract only after receiving union approval. On the other hand, *the protection of contract standards was of major interest.* The most common restrictions required the subcontractor to comply with the terms of the prime employer's contract, to have a union agreement of his own, or to employ union labor and use union-made material. [635 F.2d 880, quoting 84 Monthly Labor Review at 75; emphasis in the opinion.]

From this the *Shriver* Court of Appeals concluded:

> In other words, the purpose of subcontracting provisions in the construction industry is not simply to avoid "friction" on the jobsite that may arise when both union and nonunion workers are present. A fundamental purpose of subcontracting agreements is, and always has been, to protect contract standards in the construction industry, a goal that would be unattainable in that industry if subcontracting agreements were not allowed. [635 F.2d at 880.]

Then, after describing the special nature of employment in the construction industry, which we have discussed above, the *Shriver* opinion continues:

> Moreover, it is simply not feasible for employers and unions in the construction industry to renegotiate agreements on each jobsite, a fact recognized by Congress in enacting § 8(f) in 1959. To repeat the words of the Senate Report, labor agreements in the construction industry "necessarily apply to jobs

which have not been started and may not even be contemplated." Senate Report, *supra*, at 28 U.S. Code Cong. & Admin. News 1959, p. 2344; I Legislative History at 424. The position urged upon us by the employers would force unions and employers to negotiate subcontracting agreements on a jobsite by jobsite basis, despite the fact that § 8(f) authorizes collective bargaining agreements in the construction industry without limitation with respect to the employer's current and future jobsites in the area covered by the union's jurisdiction. We believe it to be inconceivable that the same Congress that enacted § 8(f) to accommodate the special characteristics of the construction industry ignored those very same characteristics in enacting the construction industry proviso to § 8(e). Certainly nothing in the legislative history to those sections suggests such a result. [635 F.2d at 881.]

* * *

In sum, we submit that the expressions of purpose in the Conference Report and in Senator Kennedy's statement show that the construction industry proviso protects agreements such as those here and that those legislative materials are controlling. Moreover, the history of Congress' consideration of the problems in the construction industry prior to the Conference's adoption of the construction industry proviso, and the evidence of the actual pattern of bargaining in that industry which Congress intended to preserve through that proviso further reinforce the conclusion that the subcontracting agreements at issue in this case are lawful.

C. The Legality of These Agreements is Entirely Consistent with *Connell* Because That Decision Was Limited to Agreements Outside a Collective Bargaining Relationship.

The language and the legislative history unmistakably evidence the Congressional intent not to forbid construction industry subcontracting agreements such as are involved in this case. The petitioners nonetheless argue that the proviso is inapplicable because of this Court's

decision in a prior case involving § 8(e), *Connell*. Indeed, two of them contend that *Connell* announces the extraordinary proposition that the legislative history of the proviso is to be disregarded.[14] However, a unanimous Board (239 NLRB at 248-250), the District of Columbia Circuit in *Schriver* (635 F.2d at 840-846) and the majority below (654 F.2d at 1314-1321) all determined after thorough analyses that the *Connell* decision does not extend to this case, and even the original panel of, and the dissenting judges in, the court below recognized that the result which they reached was not required by *Connell* (609 F.2d at 1347; 654 F.2d at 1325). We now show that the Board and the Courts of Appeals correctly distinguished *Connell*. Thus, nothing in the case law militates against adhering to the clear manifestations of the Congressional intent provided by the proviso's language and legislative history.

1. In *Connell* the Court stated the case as follows:

> The [union (Local 100)] supported its efforts to organize mechanical subcontractors by picketing certain general contractors, including [Connell]. The union's sole objective was to compel the general contractors to agree that in letting subcontracts for mechanical work they would deal only with firms that were parties to the union's current collective-bargaining agreement. The union disclaimed any interest in representing the general contractor's employees.
>
> . . . [T]he picketing [of Connell] succeeded, and [the Company] seeks to annul the resulting agreement as an illegal restraint on competition under federal and state law. The union claims immunity from federal antitrust statutes and argues that federal labor regulation pre-empts state law. [*Id.* at 618-619.]

After setting out the basic facts in Part I of its opinion (*id.* at 619-621), the Court in Part II discussed "orga-

[14] Brief for Pacific Northwest Chapters, Etc., pp. 40-41; Brief of Oregon-Columbia Chapter, Etc., p. 36.

nized labor's exemption from federal antitrust laws" (*id.* at 621-626). Part III considered "the construction industry proviso to § 8(e)" of the NLRA (*id.* at 626-635), and Part IV rejected Connell's contention that state, as well as federal, antitrust law "may apply" (*id.* at 635-637). The *Connell* Court's ultimate holding was:

> We therefore hold that *this agreement, which is outside the context of a collective-bargaining relationship* and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions. [*Id.* at 635, emphasis added.]

Part III of *Connell* was occasioned by Local 100's contention that "the kind of agreement it obtained from Connell is explicitly allowed by the construction industry proviso to § 8(e) and that antitrust policy therefore must defer to the NLRA". 421 U.S. at 626. The Court restated the basis of that contention by quoting the proviso and noting:

> Local 100 is a labor organization, Connell is an employer in the construction industry, and the agreement covers only work "to be done at the site of construction, alteration, painting or repair of any building, structure, or other works." Therefore, Local 100 says, the agreement comes within the [plain language of the] proviso. [*Id.* at 627]

The Court next set forth the contractor's contrary position:

> Connell responds by arguing that despite the unqualified language of the proviso, Congress intended only to allow subcontracting agreements within the context of a collective-bargaining relationship; that

> is, Congress did not intend to permit a union to approach a "stranger" contractor and obtain a binding agreement not to deal with nonunion subcontractors. [*Id.* at 627-628.]

And the Court completed its introduction to Part III by stating:

> On its face, the proviso suggests no such limitation. This Court has held, however, that § 8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment. [*Id.* at 628.]

The Court then examined the legislative history of the proviso and the other amendments to the NLRA enacted in 1959, and, on the basis of that examination, concluded:

> These careful limits on the economic pressure unions may use in aid of their organizational campaigns [in the 1959 NLRA Amendments] would be undermined seriously if the proviso to § 8(e) were construed to allow unions to seek subcontracting agreements, *at large*, from any general contractor vulnerable to picketing. Absent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on "top-down" organizing, we are unwilling to read the construction industry proviso as broadly as Local 100 suggests. Instead, we think its authorization extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the Denver Building Trades problem, possibly to common-situs relationships on particular jobsites as well. [*Id.* at 633, emphasis added, footnote omitted.]

We do not see how this language can be fairly read except as a *rejection* of Local 100's "broad" suggestion that the proviso "allow[s] unions to seek subcontracting agreements *at large*" and as an *affirmation* that the proviso's authorization *does* "extend * * * to agreements

in the context of collective agreements"—and "possibly" in one instance beyond.[15]

The manner in which the *Connell* Court analyzed the 1959 legislative history and distinguished two cases cited by the union further supports this conclusion. The Court noted that Congress apparently adopted the construction industry proviso in order to in part resolve "the problems of picketing a single nonunion subcontractor on a multi-employer building project, and the close relationship between contractors and subcontractors at the jobsite." *Id.* at 629-30. The Court also observed that the proviso has been viewed as an effort "to alleviate the frictions that may arise when union men work continuously alongside non-union men on the same construction site." *Id.* at 630, *quoting Drivers Local 695 v. NLRB*, 361 F.2d 547, 553 (D.C. Cir.).

Yet "Local 100 [did] not suggest that its subcontracting agreement [was] related to any of these policies." 421 U.S. at 631. Local 100 conceded that it sought the

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[15] We emphasize the Court's word "possibly". *Connell* does not decide whether a union without a collective bargaining relationship with a general contractor could enter into a subcontracting clause with respect to a particular jobsite, because "Local 100 [was not] trying to organize a nonunion subcontractor on the building project it picketed", *id.* at 631, and the agreement Local 100 sought was not, therefore, limited to that site. By thus leaving open the question whether such a limited agreement would be valid, the Court was indicating that there may be situations in which a subcontracting clause outside a collective bargaining relationship might be lawful. The phrasing of its statement of the scope of the Section 8(e) proviso (particularly the use of "as well") leaves no room for the contention that the particular jobsite limitation would apply where there *is* a collective bargaining relationship. *See also* the Court's holding, *id.* at 635, quoted in full at p. 29, *supra*, which invalidated only agreements outside the context of a collective bargaining relationship *and* not restricted to a particular jobsite." (emphasis added) The use of "and" rather than "or" can signify only that even some such agreements may be lawful and not that some *collective bargaining* agreements may be unlawful.

agreement "solely as a way of pressuring mechanical subcontractors in the Dallas area to recognize it as the representative of their employees." Thus, said the Court:

> If we agreed with Local 100 that the construction-industry proviso authorizes subcontracting agreements with "stranger" contractors, not limited to any particular jobsite, our ruling would give construction unions an almost unlimited organizational weapon. The unions would be free to enlist any general contractor to bring economic pressure on nonunion subcontractors, as long as the agreement recited that it only covered work to be performed on some jobsite somewhere. The proviso's jobsite restriction then would serve only to prohibit agreements relating to subcontractors that deliver their work complete to the jobsite. [*Id.* at 631-632, footnote omitted.]

The Court deemed Congressional approval of unlimited agreements with stranger contractors to be "highly improbable" because one of Congress' major aims in 1959 was to limit top-down organizing. *Id.* at 632.

In the footnote to the passage just set out (421 U.S. at 631 n.10) the Court discussed the Board's decision in *Los Angels Building and Construction Trades Council (B & J Investment Co.)*, 214 NLRB 562 (1974) and a memorandum from the Board's previous General Counsel (Mr. Peter Nash) in *Plumbers Local 100 (Hagler Construction Co.)*, No. 16-CC-447 (1974). The Court noted that in *B & J Investment* "[t]he agreement in question may have been a pre-hire contract under § 8(f) and it is not clear that the contractor argued that it was invalid for lack of a collective-bargaining relationship." 421 U.S. 631-632. *Hagler* was also distinguished because it was

> plainly addressed to a different argument that a subcontracting clause should be allowed only if there is a *pre-existing* collective-bargaining relationship with the general contractor or if the general contractor has employees who perform the kind of work cov-

ered by the agreement. [421 U.S. at 631, emphasis in original.]

The Court did not suggest that either *B & J Investment* or *Hagler* was wrongly decided. On the contrary, these cases were distinguished from *Connell* on the precise ground that in *Connell* there was no collective bargaining relationship and no attempt to obtain one.

Thus, a careful reading of the *Connell* opinion—especially its repeated references to the absence there of a "preexisting collective-bargaining" relationship, its pointed advertence to Connell's argument that the union, Local 100, was a "stranger"; and the basis on which it distinguished earlier actions by the Labor Board and its General Counsel—all fully justify the conclusion of the court below: "The first and most obvious distinction of *Connell* from the present cases is that the agreements in *Connell* arose out of the context of a collective-bargaining relationship." 654 F.2d at 1315.

2. The distinction between this case and *Connell* not only accords fully with this Court's opinion, but is essential to fulfill the Congressional intent.

Since the essence of petitioners' case is the contention that *Connell* calls for a narrow reading of the proviso in order to prevent "top-down organizing" the thoughtful discussion and rejection of that point in the opinion below merits full quotation:

> We concede that the language of the *Connell* opinion dealing with congressional antagonism to "top-down organizing" may well lean in a direction contrary to our views. We think it is countered by *Connell's* recognition of other vital concerns of collective bargaining in the construction industry reflected in the community of interest at the jobsite. There is some "top-down organizing" effect in *any* subcontracting agreement, including those which all parties must admit would be valid and within the proviso. When there are union workers on the job

next to nonunion workers, the enforcement of a subcontracting clause is still likely to have a top-down organizing effect. The answer to this point is simply that Congress recognized that the community of interests on the jobsite justified the top-down organizational consequences that may attend the protection of legitimate collective bargaining objectives there. The proviso is, after all, an exception to the general thrust of the 1959 amendments.[36]

The *Connell* opinion's condemnation of the "unlimited" top-down organizing weapon with which it was confronted must be read in the context of the applicable factual and statutory framework. Because the union in *Connell* disclaimed any interest in organizing or representing Connell's employees, its picketing was not limited to the 30 days established for organizational picketing under § 8(b)(7). It could therefore picket indefinitely to obtain its objective of a subcontracting agreement covering all subcontracting by Connell. If the subcontractor clause were held to be legitimate, there would be no limit at all to the coercive force the union could apply. The decision in *Connell* solved this problem by holding that the subcontracting agreement was an unlawful goal when it was sought outside of a collective bargaining context.

The situation is quite different when a union seeks a subcontractor clause in the context of a collective bargaining relationship. In that situation, the union's coercive force is limited. If the clause is sought in the course of organizational or recognitional picketing, that picketing will be subject to the restrictions of § 8(b)(7). If the union already represents the contractor's employees, the employer may resist any attempts to secure a subcontractor agreement by asserting its own bargaining position and presenting its own demands. The existence of a collective bargaining relationship therefore avoids the "unlimited" nature of the organizational tool involved in *Connell*, where a stranger contractor was powerless to resist unlimited coercion by any means

> other than signing the demanded subcontractor agreement.[36] Because the proviso *is* an exception to the 1959 amendments, we cannot accept the test for its interpretation adopted at the conclusion of the dissent. The issue is not which interpretation is the more faithful to Congress' overall goal in the 1959 amendments of curbing "top-down" organizing. Instead, the question is which interpretation best effectuates Congress' accommodation of the conflicting objectives of curbing "top-down" organizing and of protecting collective bargaining under the peculiar conditions of the construction industry. [654 F.2d at 1320-1321, emphasis in original.]

We call particular attention to that court's recognition that the question presented here is "which interpretation [of the proviso] best effectuates Congress' accommodation of the conflicting objectives of curbing 'top-down' organizing and of protecting collective bargaining under the peculiar conditions of the construction industry." This formulation is in accord with the teachings of this Court in *Machinists v. Labor Board*, 362 U.S. 411, where Justice Harlan wrote:

> It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The "policy of the Act" is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it. [362 U.S. at 428.]

In this connection, Justice Harlan readily granted "that the interest in employee freedom of choice is one of those given large recognition by the Act as amended [in 1947]." *Id.* But that interest did not warrant "disregard [for] the interest in 'industrial peace'" which § 10(b), also added in 1947, is intended to further. *Id.* So here, the interest in regulating top-down organizing which interferes with in employee free choice cannot override the

interest which Congress did safeguard in the Section 8(e) proviso—that of construction industry employees who have made the free choice of selecting decision in protecting their work opportunities and labor standards and of preserving existing practices in the construction industry.[16]

II. THE CONTENTION THAT IT IS UNLAWFUL TO STRIKE FOR AN AGREEMENT WHICH IS LAWFUL UNDER THE CONSTRUCTION INDUSTRY PROVISO IS NOT PROPERLY PRESENTED, AND IS WITHOUT MERIT.

A. It is contended in some of the petitioners' briefs that it is unlawful to strike for an agreement whose legality is preserved by the construction industry proviso.

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[16] In the *Machinists* opinion, Justice Harlan also disapproved an argument, closely akin to one appearing in several of the briefs on petitioners' side, based on § 7 of the Act:

> As to the argument drawn from § 7, it would be enough to note that that very provision is in terms limited by the scope of the § 8(a)(3) proviso. * * * More to the heart of the matter, it is the entire Act, and not merely one portion of it, which embodies "the definitive statement of national policy." It is well known, and the legislative history of the 1947 Taft-Hartley amendments plainly shows, that § 8(a)(3)—including its proviso—represented the Congressional response to the competing demands of employee freedom of choice and union security. Had Congress thought one or the other overriding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable. It is not for the administrators of the Congressional mandate [or the courts] to approach either side of that line grudgingly. [362 U.S. at 417-418, n.7.]

In the same footnote, Mr. Justice Harlan disposed summarily of the

> principle that, exoneration of certain types of union security clauses having been granted in a proviso, the burden of proving the proviso's applicability rests on him asserting it. The latter principle need not detain us; insights derived from syntactical analysis form a hazardous basis for the explication of major legislative enactments. [*Id.* at 417 n.7.]

That issue is not properly presented, for two reasons. First, the General Counsel, exercising his exclusive authority to determine the scope of unfair labor practice complaints (see §§ 3(d) and 10(b) of the Act) did not proceed on that theory and for that reason alone, the Board correctly refused to grant relief on that theory. Indeed, the Board would have usurped the General Counsel's authority by considering that issue. Second, petitioners did not themselves raise the issue before the Board, and are therefore barred from raising it in the courts by virtue of § 10(e) of the Act. The fact that the court below did pass on the contention, and rejected it on the basis of the uniform precedent in the Ninth Circuit and in other Courts of Appeals (654 F.2d at 1323) does not remove the § 10(e) bar, for that provision is a limitation on the authority of the courts. *Labor Board v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 and cases cited *id.* See also, *e.g.*, *Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276, 281, n.3.

B. Nonetheless, in what may be an excess of caution, we show petitioners' contention—that only voluntary § 8(e) proviso agreements are lawful—to be without merit. Since, as already noted, the contention is not properly here, and has been uniformly disapproved by the Courts of Appeals,[17] our discussion can be brief:

1) Petitioners' interpretation is contrary to the plain language of the provision upon which they rely, § 8(b)(4)(A). As amended in 1959, that provision now declares it to be an unfair labor practice to engage in

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[17] *Essex County and Vicinity Dist. Council of v. NLRB*, 332 F.2d 636 (3d Cir.); *Orange Belt Dist. Council of Painters No. 48 v. NLRB*, 328 F.2d 534 (D.C. Cir.); *Constr. Prod. & Maintenance Laborers Union, Local 383 v. NLRB* (*Colson & Stevens Construction Co.*, 323 F.2d 422 (9th Cir.). See also *Northern Indiana Bldg. and Const. Trades Council* (*Centlivre Village Apartments*), 148 N.L.R.B. 854 (1964) overruling *Constr. Prod. & Maintenance Laborers Local 383* (*Colson & Stevens Constr. Co.*), 137 N.L.R.B. 1650 (1962).

certain conduct (including strikes) where an object is "forcing or requiring any employee or self-employed person * * * to enter into any agreement which is prohibited by subsection (e) of this section [8]." An agreement which is within the proviso to subsection (e) is *not* "prohibited" by that subsection; the very purpose of that proviso is to protect such agreements.[18]

2) Here again, the legislative history confirms the interpretation that flows from the natural reading of the language. Petitioner Woelke presents a misleading partial quotation from Senator Kennedy. According to Woelke, Senator Kennedy stated that ". . . the [construction industry] proviso does not relate to Section 8(b)(4) . . . II Leg. Hist. 1433 (1959)." Woelke & Romero Br. p. 45. What he actually said in that sentence was, "Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the *Sand Door* case (357 U.S. 93) is applicable." 2 Leg.Hist. 1433. That sentence, therefore, does not address the present problem. Senator Kennedy did, however, address that in the *next* sentence of his speech (not quoted by Woelke). He said, "It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract." *Id.* In light of that statement, it is again necessary to consider what Congress viewed the law to have been with respect to the strikes to obtain contracts such as those involved in the present case. *Brown v. GSA*, 425 U.S. 820, 828; *Moor v. County of Alameda*, 411 U.S. 693, 711.

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[18] If petitioners' interpretation were accepted and the construction industry proviso were to be disregarded in determining the legality of a strike to obtain an agreement which would be within § 8(e) but for the proviso, it would also be unlawful for unions in the garment and clothing industries to strike to obtain a clause protected by *that* proviso. This would result in the incongruity that unions could strike to enforce such agreements (as the garment industry proviso clearly provides to that extent for the overruling *Sand Door*) but could not strike to obtain them.

Again, Congress' understanding of the then existing state of the law clearly appears in the legislative history. Senator Kennedy's own views are reflected in a statement prepared by him and Representative Thompson and presented by the latter to the House after the Conference had acted. After describing "hot cargo" clauses, and the holding of *Sand Door* that a union may not strike to enforce such a clause, that statement continues:

> Unfortunately there are a good many cases in which the Teamsters, without any inducement of employees, is often able to persuade the secondary employer not to carry the goods and not to require his employees to handle them. It is very hard for a trucking firm either to resist the Teamsters' demand for a hot cargo clause in collective bargaining, when the price of resistance would undoubtedly be a strike for still higher wages, or to refuse to live up to the contract once it has signed it, when the cost of noncompliance would undoubtedly be the Teamsters' insistence that the contract had been terminated by the violation, thus freeing the union to present new demands in collective bargaining. [2 Leg. Hist. 1708.]

Prior to the Conference Report other members of Congress who proposed to outlaw strikes to obtain "hot cargo" clauses (as well as the clauses themselves) expressed their understanding that such strikes were then lawful. See 2 Leg. Hist. 944 (Senator Dirksen, presenting the Administration's bill); 2 Leg. Hist. 1079 (Senator Goldwater); 2 Leg. Hist. 1197 (Senator Curtis); 2 Leg. Hist. 1462 (Representative Cramer); 2 Leg. Hist. 1523 (Representative Griffin); and 2 Leg. Hist. 1581 (Representative Rhodes).

Accordingly, we think it is too clear to be questioned that Congress understood the law which it was preserving with respect to the construction industry was that strikes

to obtain agreements, which would have been prohibited but for the proviso, were lawful as the law then stood.[19]

Thus, there is no merit in petitioners' contention that it is unlawful for a union to strike to obtain an agreement which is protected by the construction industry proviso to § 8(e).

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[19] At p. 46 of its brief, Woelke cites three cases which purportedly of stand for the proposition that picketing to obtain a subcontracting clause was illegal under § 8(b)(4) at the time of the 1959 amendments. Woelke's reliance on these cases is entirely unjustified. In the first of these the Board found that *an* object of the strike was to require the picketed general contractor to cease doing business with a particular nonunion subcontractor on a presently existing project, and therefore was an example of a classic secondary boycott in violation of what was then § 8(b)(4)(A). *Local 47 International Bro. of Teamsters, Etc.*, 112 NLRB 923, 924-925 (emphasis in original) enforced on this theory, 234 F.2d 296, 300-301 (5 Cir.). Indeed, the Board in the *Local 47* case took pains to observe: "Whether the unions' picketing also violated 8(b)(4)(A) insofar as it sought to regulate further dealings by [the general contractor] with such subcontractors (not as yet identified) as might refuse to meet the unions' wage standards, is a question which we need not and do not decide." (112 NLRB at 925, n.2). In the second case cited by Woelke, *Bangor Building Trades Council, AFL-CIO*, 123 NLRB 484, enforced on this theory, 278 F.2d 287 (1 Cir.), the unions were not even attempting to have the general contractor enter into a subcontracting clause, but rather were picketing to enforce an existing clause by requiring the general contractor to terminate the subcontractor or require the latter to conform to union standards. This was, of course, conduct identical to that found illegal in *Sand Door*, as the Board said (123 NLRB at 489 and n.3). The final case cited by Woelke, *Bricklayers, Masons, Etc.*, 125 NLRB 1179, is also completely irrelevant, since it was decided on December 29, 1959, more than three months after the enactment of the 1959 NLRA amendments by President Eisenhower's signature on September 14, 1959.

In short there was simply nothing in the 1947 statute which forbade strikes for an object of compelling an employer to enter into a "hot cargo" clause. Section 8(b)(4)(A) (as it then was; it is now 8(b)(4)(B)) prohibited secondary boycotts, which included, as *Sand Door* held, a strike to enforce a "hot cargo" clause. But since such agreements were lawful and under *Sand Door*

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals affirming the order of the Board should be affirmed.

Respectfully submitted,

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judicially enforceable (see 357 U.S. at 108), it would have been contrary to the whole spirit of the Act to hold that a union could not strike to obtain such an agreement. See, in addition to § 13, *Labor Board v. American National Insurance Co.*, 343 U.S. 395.

STATUTORY APPENDIX

This case involves §§ 8(b)(4) and 8(e) of the National Labor Relations Act, 49 Stat. 449, 61 Stat. 136, 29 U.S.C. §§ 141 *et seq.*, Title 7 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519. Section 8(b)(4) provides in pertinent part as follows:

> Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents: * * *
>
> "(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> "(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);
>
> "(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to

make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * *

Section 8(e) provides as follows:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms 'any employer', 'any person engaged in commerce or an industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."